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No. 84-571

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1984

HARRY N. WALTERS, ADMINISTRATOR OF VETERANS' AFFAIRS, ET AL., APPELLANTS

v.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF THE FEDERAL BAR ASSOCIATION AS AMICUS CURIAE

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QUESTION PRESENTED

Does a legitimate Governmental interest compel that veterans or their survivors seeking service-connected death and disability benefits from the Veterans Administration be denied the opportunity to retain counsel to act on their behalf, when the Veterans Administration is the only forum within which to claim such benefits and there is no right to judicial review of the decisions of the Veterans Administration with respect to such claims?

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The Federal Bar Association, with the consent of the parties, submits this Brief as amicus curiae in support of Appellees.

INTEREST OF THE FEDERAL BAR ASSOCIATION

The Federal Bar Association is a professional association of approximately

14,500 lawyers and judges, the majority of whom are now or have been in service to the Federal Government. Its members are dedicated to advancing the science of jurisprudence and promoting the sound administration of justice and the highest quality representation before the Courts, departments, and agencies of the United States.

In this action, the United States District Court has enjoined enforcement, pendente lite, of 38 U.S.C. §§ 3404-3405, which impose a $10 limit on fees that may be charged for the representation of veterans, or their survivors, pursuing service-connected death and disability claims before the Veterans Administration. In 1983, the National Council of the Federal Bar Association approved a Resolution declaring that this fee limitation "works a hardship in depriving

applicants [for] veterans aid of necessary and adequate representation" and that attorneys representing such applicants should be permitted to charge a "fair and reasonable" fee. In the view of the Federal Bar Association, this fee limitation has outlived any perceived utility to the point that it now serves no legitimate Governmental purpose, and this ruling correctly foreshadows its demise.

The parties to this case necessarily must focus upon the facts and the law in the context of their own interests and the particular circumstances of this litigation. But the decision below, and the Constitutional infirmities of these statutory provisions, impact broadly upon the public's perception of how Federal agencies may conduct their business with an eye toward the even administration of

justice, not only for our Nation's veterans, but also for all our citizens. As a practical matter, these provisions deny veterans and their survivors the opportunity to employ counsel, if they choose, to establish their entitlement to these benefits in the only forum available to them. In these circumstances, denial of retained counsel, in the guise of concern for our veterans, is too severe to withstand Constitutional analysis, and is a disservice to the public, the Government, and ultimately the veterans themselves.

SUMMARY OF ARGUMENT

A. The Veterans Administration ("VA") is the only forum in which veterans or their survivors may enforce their statutory entitlement to service-connected death or disability benefits. There is no alternative remedy; there is no right

to appeal adverse VA determinations. In these circumstances, preclusion of retained counsel, engaged and paid by the applicants themselves, is incompatible with the fundamental fairness that the Due Process Clause requires. Boddie v. Connecticut, 401 U.S. 371 (1971).

B. To establish their entitlement to benefits, applicants necessarily must marshal evidence and meet the requirements of pertinent statutes and regulations, including a plethora of VA directives, decisions, and operating procedures. The presentation of a claim thus embraces the tasks that lawyers traditionally perform, and it is not surprising that the VA itself uses lawyers in these proceedings. Indisputably a lawyer's training and advice will increase the likelihood that an applicant's appearance before the VA will be a

"meaningful" appearance. E.g., Goldberg v. Kelly, 397 U.S. 254, 270-271 (1970).

C. No legitimate Governmental interest compels shutting the VA door to retained counsel. Appellants' suggestion that, because these benefits are assertedly "gratuities," the Constitution should tolerate an "experiment" that fails to comport with due process, or other Constitutional norms, is an argument long ago rejected by this Court. E.g., Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969). The paternalistic notion that proceeding without legal advice is really in the veteran's best interest is punctured when the system as it actually operates is examined and the "claimed benefits [are] candidly appraised." In re Gault, 387 U.S. 1, 21-22 (1967). The Government's other asserted interests -- that there is some worth in keeping the

proceedings informal and that veterans and their survivors must be protected from unscrupulous lawyers -- simply do not warrant the draconian measure of restricting access to retained counsel. If informality is desirable, it need not be incompatible with legal representation. And the Government's concerns with respect to lawyers meeting their professional obligations may be met with alternative, less drastic measures, such as supervising and approving fee arrangements.

D. The Nation as a whole, including our Government, is served by Federal agencies' conducting their business in a way that ensures the sound administration of justice. The Government's interest also is served by maximizing recovery of these benefits by those entitled to receive them. The extensive District

Court Record, with findings that Appellants do not even attempt to challenge as clearly erroneous, reflects in detail the disturbing degree to which applicants for these benefits are disadvantaged by inability to retain counsel. The public's interest will be served by allowing applicants, if they choose to do so, to engage counsel committed to representing them competently, zealously, and loyally.

ARGUMENT

NO LEGITIMATE GOVERNMENTAL INTEREST COMPELS THAT VETERANS OR THEIR SURVIVORS BE DENIED THE OPPORTUNITY TO RETAIN COUNSEL, IF THEY WISH TO DO SO, TO REPRESENT THEM BEFORE THE VETERANS ADMINISTRATION.

Appellants argue that retained counsel is not "necessary" to a proceeding before the VA. The Disabled American Veterans, as amicus curiae supporting Appellants,

adds that opening up proceedings to retained counsel will sound the deathknell for those organizations that now provide non-legal representatives, free of charge, to applicants for these veterans benefits.

Both contentions miscast the issue. The real question is not merely whether the proceedings will be fairer with counsel present, although we believe, as the District Court found on the extensive evidence, that they indeed will be. Nor is it whether applicants must use retained counsel, to the exclusion of other or no representatives. Rather, the question is whether these statutes may stand even though they deny an applicant the freedom to retain a lawyer to appear on his behalf. No valid Governmental interest exists that compels this restriction on access to a lawyer's services.

Appellants speak of the proceedings before the VA as a Congressional "experiment." Applying terms currently in vogue to a restriction imposed over 120 years ago, and indeed in the absence of any real basis for the characterization, Appellants label the absence of counsel as part of a means for "alternative dispute resolution." Quite simply, however, applicants seeking these benefits cannot afford the luxury of this experiment. There is no other forum and no right to appeal. None of the methods of alternative dispute resolution currently popular, such as arbitration, "mini-trials" or "summary jury trials," commends the mandatory preclusion of counsel. Beyond doubt, procedures for resolving disagreements may be made simpler, quicker, and cheaper, without

also absolutely denying the right of a party to employ counsel if he wishes.

I. THE IMPORTANCE OF LEGAL ADVICE TO APPLICANTS FOR THESE BENEFITS COMPELS THAT THEY BE PERMITTED TO RETAIN COUNSEL IF THEY WISH TO DO SO.

A. Because No Other Forum Exists Within Which Applicants May Show Their Entitlement To These Benefits, Special Care Must Be Taken To Assure Due Process of Law.

Indisputably no forum other than the VA exists within which veterans or their survivors can obtain these benefits. No civil remedies are available to enable them to pursue such claims in litigation. E.g., Feres v. United States, 340 U.S. 135 (1950). The VA's determination "on any question of law or fact" is immune from any appeal. E.g., 38 U.S.C. § 211(a). Veterans and their survivors

have no choice but to pursue their application for statutory benefits as vigorously as possible before the VA.

In these circumstances, there must be a special sensitivity to the requirements of the Due Process Clause. In Boddie v. Connecticut, 401 U.S. 371 (1971), for example, the Court held that a State may not, solely because of inability to pay, deny access to its courts to individuals who seek judicial dissolution of their marriages. Critical to this holding was the "state monopolization of the means for legally dissolving" the marital relationship. 401 U.S. at 374.

> "Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle." 401 U.S. at 375.

The District Court found, on an extensive Record, that the $10 fee limitation operates for many applicants as a bar to deny "meaningful" access to the one available forum in which to claim these benefits. Here, no less than in Boddie, the VA's monopoly on the forum must be tempered by the requirements of the Due Process Clause. Forcing veterans to take their one bite of the apple without aid of counsel is a Constitutional anomaly, and should not be permitted to continue.

B. Denying Veterans The Opportunity To Retain Counsel May Deny Them A Meaningful Opportunity To Be Heard.

Over 50 years ago this Court stated, "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." Powell v. Alabama, 287 U.S. 45, 69 (1932). A bedrock principle of our jurisprudence is that assuring a "meaningful opportunity to be heard," see, e.g., Armstrong v. Manzo, 380 U.S. 545, 552 (1965), includes the opportunity to retain counsel.

> "'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.' . . . Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient." Goldberg v. Kelly, 397 U.S. 254, 270-271 (1970), quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

The nature of the VA proceedings at bar underscores the importance of these principles. Simply stated, establishing eligibility to benefits requires proving the existence of a service-connected death or disability, frequently requiring the marshalling of many and complex facts, and making the appropriate causal connection to service in the Armed Forces. This assembly, study, and applying of facts to law -- sifting the relevant from the irrelevant -- is of course the ordinary work of lawyers; indeed, it lies at the very heart of the attorney-client relationship. See Upjohn Co. v. United States, 449 U.S. 383, 390-391

(1981); Hickman v. Taylor, 329 U.S. 495, 511 (1947); ABA Code of Professional Responsibility, Ethical Consideration 4-1. So, too, applying these selected facts to the pertinent laws and regulations is legal work. Knowledge of the pertinent statutes, the Code of Federal Regulations, the Federal Register, and the VA's internal operating procedures and directives, is, to say the least, beyond the ken of most laymen.

It is thus not surprising that the VA itself uses lawyers to handle these cases. Denying veterans the opportunity to employ their own counsel, with ethical obligations monitoring their service to their clients, is to stack the deck against the veterans. An illustration taken from the Brief for Appellants, describing how veterans may perfect an

administrative appeal within the VA, is instructive.

Under the regulations, a claimant is entitled to receive from the VA a "statement of the case" to help him perfect his appeal. The VA-prepared "statement of the case" is required to summarize the evidence pertinent to each issue as to which the claimant has "expressed disagreement." It must summarize the applicable law and regulations. And it must state the VA's determination on each issue, with the reasons given for each determination as to which the claimant has expressed disagreement. In all, the statement of the case must "be complete enough to allow" the claimant to present his written or oral arguments in the VA appeal. Brief for Appellants at 7 (citations and footnote omitted).

It is manifestly unfair to deny a veteran the opportunity to retain his own lawyer to review this work of a VA lawyer, so that his counsel may ensure that the statement of the case is in fact "complete enough" and that it fairly summarizes the evidence, states the legal issues, and summarizes the applicable law and regulations. These are legal concepts to which the training and experience of a legal advocate should be brought to bear. If a veteran desires to employ counsel, to obtain the professional advice of one specially trained in the resolution of disputes within the bounds of due process, he should not be denied that opportunity.

II. NO LEGITIMATE GOVERNMENTAL INTEREST COMPELS DENIAL OF COUNSEL, IF AN APPLICANT WISHES TO RETAIN ONE.

A. The Asserted Paternalism Of The VA Is No Substitute For Retained Counsel.

Relying on a paternalism that the District Court Record illustrates is more apparent than real, Appellants assert that the introduction of retained counsel into the veterans proceedings will inhibit their "informality" and "nonadversarial" nature. The proceedings, Appellants contend, currently are supposedly undertaken in the best interests of the veteran; denying a veteran the chance to speak through a lawyer is for his own good. Nearly 20 years ago, this Court considered and rejected similar arguments against the introduction of due process guarantees in proceedings to determine

juvenile delinquency and commitment. In re Gault, 387 U.S. 1 (1967).

In Gault, the State had argued that a juvenile benefits from the informal, supposed nonadversarial nature of the proceedings, assertedly undertaken in furtherance of parens patriae. 387 U.S. at 21-22, 25-27. This Court found, however, that "the appearance as well as the actuality of fairness, impartiality and orderliness -- in short, the essentials of due process -- may be a more impressive and more therapeutic attitude so far as the juvenile is concerned." 387 U.S. at 26. In words dramatically pertinent to this case, in which the District Court Record shows how in fact the veterans fare without counsel, this Court said, "[I]t is important, we think, that the claimed benefits . . . should be candidly appraised. Neither sentiment nor folk-

lore should cause us to shut our eyes" to the "startling findings" about failures of the system. 387 U.S. at 21-22. The extensive District Court Record, as summarized in the Brief for Appellees, provides the "startling findings" that the VA's supposed paternalism does not inure to the veterans' best interests. And indeed, in view of the mandate that VA employees may assist veterans to develop their claims "while protecting the interests of the Government," 38 C.F.R. § 3.103(a), the VA personnel possess a divided loyalty assuring that the VA cannot fully serve the best interests of the applicants.

B. Use Of Retained Counsel Should Not Be Incompatible With The VA's Conducting Its Proceedings In The Best Interests Of Veterans.

If "informality" be viewed as a desirable feature of these proceedings, it is certainly not impossible to conduct them with a measure of informality even with counsel present. Nor must it be that, because a veteran appears through counsel, the VA must exhibit less concern for the welfare of the applicant. See In re Gault, supra, 387 U.S. at 27.

There is nothing unique to veterans proceedings that should justify barring counsel. No such preclusion of lawyers appears in other forums designed particularly for the welfare of individuals, including individuals of low or modest means. Thus, counsel appear in workers compensation, social security, and civil

service proceedings. Counsel may appear in the small claims courts. And, of course, counsel are not barred from participating in arbitrations or other true "alternative" methods of dispute resolution that are designed to economize, expedite, and otherwise facilitate the resolution of controversies.

Appellants hypothesize a need to protect veterans against unscrupulous practices of lawyers. This intuitive indictment of the profession is an insult to the many Members of the Bar who conform their behavior to their professional obligations, including those requiring reasonableness of fees and service in the public interest. See, e.g., ABA Code of Professional Responsibility, Disciplinary Rule 2-106; Ethical Considerations 2-16, 2-17, 2-24, 2-25. Moreover, allowing counsel to participate, when applicants

want counsel to participate, does not require that there be no monitoring of fee agreements or fee awards. Just as in workers compensation proceedings under many statutory schemes, fees paid to counsel may be made subject to review and approval. In short, there are certainly alternative, less drastic means to undertake the monitoring of lawyers that Appellants deem necessary. No reason exists in law or logic automatically and conclusively to deny veterans the opportunity to select and retain counsel to represent their interests.

C. The Government May Not Restrict Meaningful Access To VA Proceedings On The Assertion That VA Benefits Are "Gratuities."

Appellants argue that there should be "wide latitude" with respect to "the process by which claims are adjudicated

and benefits paid," "[b]ecause VA benefits are 'gratuities' that are funded entirely from public appropriations and do not involve financial contributions from veterans." Brief for Appellants at 32 (citations omitted). This argument resurrects a contention long rejected by this Court in Governmental benefits cases. A procedure Constitutionally defective may not be saved by an invocation that the public-assistance benefit involved is "'a "privilege" and not a "right."'" Goldberg v. Kelly, 397 U.S. 254, 262 (1970), quoting Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969). See also Evitts v. Lucey, 53 U.S.L.W. 4101, 4105 (U.S. Jan 21, 1985) ("when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution --

and, in particular, in accord with the Due Process Clause"). The Government may not with one hand extend an entitlement to benefits, while with the other it erects impermissible barriers to those claiming their statutory entitlements.

III. PRECLUDING REPRESENTATION BY RETAINED COUNSEL IS OFFENSIVE TO BASIC NOTIONS OF HOW OUR FEDERAL AGENCIES SHOULD CONDUCT THEIR BUSINESS AND DISSERVES THE GOVERNMENT'S INTEREST.

A. In Representing Their Clients Loyally And Zealously, Veterans' Lawyers Will Facilitate The Even Administration Of Justice In Conformity With The Law.

This case presents an unfortunate, stark contrast between the apparent and the real. Appellants' Brief surveys the law and the regulations and blithely ignores the extensive District Court Record of how the system actually works.

But any overall impression of fairness is belied by reality.

To cite but one example, Appellants note that, pursuant to 38 C.F.R. § 3.103(c), a claimant is "entitled to a hearing at any time on any issue involved in a claim." At the hearing, the claimant may "present any evidence or arguments that bear on the claim"; and it "is the responsibility of the Veterans' Administration personnel conducting the hearing to explain fully the issues and to suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to his position." Id., quoted in Brief for Appellants at 6.

In practice, the District Court found, based upon the evidence, that the VA "discourages applicants from exercising their right to request a hearing at any

time until after the initial determination has been made in their case, even though this denial precludes claimants from having direct input into the most critical stage of the adjudication of their claim." National Association of Radiation Survivors v. Walters, 589 F. Supp. 1302, 1321 (N.D. Cal. 1984).

If veterans are able to employ counsel, the likelihood is greater that claims determinations will be made after all competing or complementary interests are considered. The risk of overreaching, summary decisionmaking, or otherwise ignoring rules designed to ensure fairness will be minimized. And all the Nation, including its veterans, benefits from the sound administration of justice.

B. Important Governmental Interests Are Served By Allowing Applicants To Retain Counsel If They Wish To Do So.

The very provision of these benefits to veterans and their families reflects the Nation's interest in providing for those who have served their country. The Government's interest is served by assuring that all those entitled to these benefits receive them, and that the level and duration of benefits continue to the maximum extent permitted by law. The Government is thus served by lawyers who, in discharge of their professional obligations, seek to maximize the benefits awarded to their clients. See Goldberg v. Kelly, 397 U.S. 254, 264-265 (1970).

CONCLUSION

For the foregoing reasons, the decision of the District Court should be affirmed.

Respectfully submitted,

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